

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 April 2007

BALCA Case No.: 2007-PER-00018

ETA Case No.: C-05237-26612

In the Matter of:

DENNY'S LANDSCAPING,

Employer,

on behalf of

JOSE OCHOA,

Alien.

Certifying Officer: Dominic Pavese
Chicago, Illinois

Appearance: Caridad Pastor Cardinale, Esquire
For the Employer and the Alien

Gary M. Buff, Harry L. Sheinfeld, and R. Peter Nessen
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Wood, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.¹ The following decision is based on the record

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

upon which the Certifying Officer (“CO”) denied certification, the Employer’s Statement of Position submitted on February 8, 2007, and the Brief of the Certifying Officer, which was filed on February 13, 2007. 20 C.F.R. § 656.27(c) (2005).

STATEMENT OF THE CASE

On October 31, 2005, Denny’s Landscaping (“Employer”) filed an application for Permanent Employment Certification (“ETA Form 9089”) on behalf of the Alien for a “Landscape Designer” position. *AF* 28-37. The SOC/O*NET code provided was 17-1012.00, which corresponds to the occupational title “Landscape Architect.”² *AF* 29. The job duties were described as

[p]lans and designs land areas, prepares site plans and cost estimates for land development, co-ordinates arrangements of existing and proposed land features, inspects work in progress to ensure compliance with landscape specifications and advise client and crew on landscape features and clears snow during the winter months.

AF 30. The Employer did not require that an applicant have a minimum education level but required 60 months of experience in the job offered. *Id.* The offered wage was \$26.84 per hour. *AF* 29.

On November 16, 2005, the CO denied certification because the Employer had improperly treated the position as a nonprofessional occupation for the purposes of recruitment under 29 C.F.R. § 656.17(e) (2005). *AF* 25-27. The CO explained that the title “Landscape Architect,” which corresponds to the SOC/O*NET code on the ETA Form 9089, is a professional occupation according to Appendix A of the Preamble to 20 C.F.R. Part 656 (“Appendix A”). *AF* 27. Thus, the CO concluded that additional recruitment efforts should have been made in accordance with 29 C.F.R. § 656.17(e)(1) because the application was for a professional occupation. *Id.*

² The O*NET system was developed by the U.S. Department of Labor to assist workforce professionals in properly identifying jobs. Occupational Information Network, *O*NET Code Connector: New User Information*, available at <http://www.onetcodeconnector.org/help/general/newusr> (Mar. 12, 2007).

The Employer filed a request for review on December 14, 2005. *AF 4-24*. The Employer argued that a Landscape Designer is not the same as a Landscape Architect, is not a professional occupation, and is not listed in Appendix A. *AF 4-5*. To support this argument, the Employer noted that its ETA Form 9089 clearly indicated that the occupation title was “Landscape Designer” and that applicants were not required to have a bachelor’s degree, as is customary for a Landscape Architect. *AF 5*. The Employer explained that it used the SOC/O*NET code for Landscape Architect because it was the only job title available in the SOC/O*NET that closely resembled the Landscape Designer title. *Id.*

The Employer then distinguished the Landscape Designer position that was offered from the Landscape Architect description provided through the O*NET summary report. The Employer noted that its Landscape Designer position does not require a four-year degree. *AF 5*. The Employer also noted that there are several job duties listed for Landscape Architect on O*NET that are “wholly different” than those stated by the Employer in the ETA Form 9089. *Id.*

[T]he O*NET description includes conferring with engineers, compiling and analyzing data on conditions, such as location, drainage, and location of structure for environmental reports. These job duties would mean that the job applicant must possess knowledge of engineering principles and terminology as well as environmental protection theories.

Id. The Employer went on to list several areas of knowledge from the O*NET summary report for Landscape Architect that did not coincide with the Employer’s Landscape Designer position. These included the production of technical plans, blueprints, drawings, and models; knowledge of the materials, methods, and tools involved in construction and repair of structures; business and management skills such as resource allocation and production methods; practical application of engineering science and technology; and computer skills. *AF 5-6*.

The CO upheld his decision to deny the Employer’s application for certification on December 13, 2006. *AF 1-2*. The CO reiterated that the Employer listed the SOC/O*NET code for Landscape Architect, which is found in Appendix A and is considered a professional

occupation. *AF 1*. The CO determined that the SOC/O*NET code listed on the ETA Form 9089 was appropriate for the job duties described and held that the Employer did not conduct the required recruitment for a professional occupation. *Id.* As a result, certification was denied. The matter was forwarded to the Board of Alien Labor Certification Appeals (“BALCA”) on December 14, 2006. The Employer provided a Statement of Position on February 8, 2007, and the CO provided a brief on February 13, 2007.

DISCUSSION

We affirm the CO’s denial of certification on the basis that the Employer failed to properly recruit for a professional occupation, as required under 20 C.F.R. § 656.17(e)(1). When an employer applies for certification on behalf of an alien, the job duties described must “be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation *as shown in the O*NET Job Zones.*” 20 C.F.R. § 656.17(h) (2005) (emphasis added). The employer must take certain recruitment steps depending on whether the position is a professional occupation or a nonprofessional occupation. 20 C.F.R. § 656.17(e). Appendix A of the Preamble to 20 C.F.R. Part 656 provides an extensive list of professional occupations, which are defined as “occupation[s] for which the attainment of a bachelor’s or higher degree is a usual education requirement.” 20 C.F.R. § 656.3 (2005); (*see also* ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States* [“PERM”], 20 C.F.R. Part 656, 69 Fed. Reg. 77326, 77346 (Dec. 27, 2004)).³

In this case, there are three indications that the Employer’s Landscape Designer position is the equivalent of a Landscape Architect position under the O*NET guidelines.

³ Appendix A was based on efforts by the Bureau of Labor Statistics (“BLS”) to describe the educational requirements of occupations in the *Occupational Outlook Handbook*. 69 Fed. Reg. at 77,346. The BLS had a difficult time describing the requirements because “for most occupations, there is more than one way to qualify for a job. For example, registered nurses may obtain their training in bachelor’s degree or hospital diploma programs. The challenge was to determine the training category that best reflects the typical conditions and the preference of most employers.” *Id.*

O*NET online is the source of additional information about the occupations described by the BLS and is also the source from which employers applying for alien labor certification are required to consult to categorize the position being offered to the alien. *Id.*

First, the title Landscape Designer is listed in the O*NET Summary Report for Landscape Architect under “Sample of reported job titles,” which indicates that the two titles are considered synonymous for O*NET job description purposes. *AF 8*.

Second, the job duties listed on the ETA Form 9089 closely resemble those listed in the O*NET description of a Landscape Architect’s duties. O*NET describes the Landscape Architect’s tasks as follows:

1. Prepare site plans, specifications, and cost estimates for land development, coordinating arrangement of existing and proposed land features and structures.
2. Confer with clients, engineering personnel, and architects on overall program.
3. Compile and analyze data on conditions such as location, drainage, and location of structures for environmental reports and landscaping plans.
4. Inspect landscape work to ensure compliance with specifications, approve quality of materials and work, and advise client and construction personnel.

AF 8. Aside from the Employer’s additional requirements that the applicant do some manual labor, the job tasks for the Landscape Designer position mirror those listed for Landscape Architect on O*NET. This indicates that the position should have been categorized as a Landscape Architect position.

And finally, the Employer’s requirement that an applicant for the Landscape Designer position have 60 months (five years) of experience in the job indicates that the position is compatible with the O*NET Landscape Architect title. While the Appendix A list of professional occupations is made up of jobs customarily associated with the attainment of a bachelor’s or higher degree, that education level is not mandatory. Work experience can qualify an applicant for a position that is usually associated with a bachelor’s or higher degree.⁴ This is

⁴ In response to criticism that the codified definition of “professional occupation” should not be limited to those occupations for which the attainment of a bachelor’s or higher degree is a usual requirement, the Employment and Training Administration (“ETA”) stated that the “list of occupations in Appendix A is a list of occupations for which a bachelor’s degree is the usual requirement for entry into the occupation. The fact the [sic] alien does not hold a bachelor’s degree has no bearing on the recruitment regimen to be followed by the employer.” 69 Fed. Reg. at 77345-46. In other words, the designation of professional occupation does not mean that only those with bachelor’s or higher degrees can apply. Following that logic, an employer cannot avoid classifying position as an Appendix A professional occupation by simply not requiring that the applicant have a bachelor’s or higher degree.

illustrated in the “Landscape Architect” O*NET Summary Report provided by the Employer, which states that the positions require a minimum of two to four years of work-related skill, knowledge or experience and that “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” *AF II*.

“The primary purpose of the list of occupations [in Appendix A] is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations.” 69 Fed. Reg. at 77,346. Landscape Designer was listed as an alternative title for Landscape Architect in the O*NET Summary Report. The job duties, wages offered, and required level of experience for the Landscape Designer position closely matched those of a Landscape Architect. Additionally, the Employer admitted that the SOC/O*NET code for Landscape Architect was the closest match to the title for the job offered. These similarities should have informed the Employer that it needed to recruit according to the professional occupation standards set forth at 20 C.F.R. § 656.17(e). As a result, we find that the CO correctly denied certification because the Employer did not properly treat the job as a professional occupation for the purposes of recruitment.

ORDER

Based on the foregoing, the Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless, within twenty (20) days from the date of service, a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is

necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed at the following address:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400N
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties and be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.